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CALIFORNIA LEGISLATURE—2015–16 REGULAR SESSION

ASSEMBLY BILL

No. 1924

**Introduced by Assembly Member Low
(Principal coauthor: Assembly Member Bigelow)**

February 11, 2016

An act to amend Sections 638.52 and 1546.1 of, and to add Sections 638.54 and 638.55 to, the Penal Code, relating to privacy, and declaring the urgency thereof, to take effect immediately.

LEGISLATIVE COUNSEL'S DIGEST

AB 1924, as amended, Low. Pen registers: trap and trace devices: orders.

(1) Existing law generally makes it a crime to install or use a pen register or trap and trace device without court approval. Existing law allows a peace officer to make an application to a magistrate for an order authorizing or approving the installation and use of a pen register or trap and trace device and requires a provider of wire or electronic communication service, landlord, custodian, or other person, upon presentation of an order, to provide the peace officer with all information, facilities, and technical assistance necessary to accomplish the installation, as specified, if the assistance is directed by the order. Under existing law, an order or extension order authorizing or approving the installation and use of a pen register or a trap and trace device is required to direct that the order be sealed until otherwise ordered by the magistrate who issued the order, or a judge of the superior court,

and that the person owning or leasing the line to which the pen register or trap and trace device is attached, or who has been ordered by the court to provide assistance to the applicant, not disclose the existence of the pen register or trap and trace device or the existence of the investigation to the listed subscriber or to any other person, except as specified.

This bill would instead require an order or extension order authorizing or approving the installation and use of a pen register or a trap and trace device direct that the order be sealed until the order, including any extensions, expires, and would require that the order or extension direct that the person owning or leasing the line to which the pen register or trap and trace device is attached not disclose the existence of the pen register or trap and trace device or the existence of the investigation to the listed subscriber or to any other person. The bill would require a government entity that obtains information pursuant to an order for a pen register or trap and trace device to notify the identified targets of the order within 30 days after the termination of the period of the order that information about the recipient has been compelled or requested. The bill would allow a court to order a delay of this notification if it finds that there is reason to believe notification may have an adverse result, as defined, and to grant extensions of the delay, as provided. The bill would require the requesting peace officer's law enforcement agency to compensate a provider of a wire or electronic communication service, landlord, custodian, or other person who provides facilities or technical assistance pursuant to these provisions for the reasonable expenses incurred in providing the facilities and assistance.

(2) Existing law authorizes a government entity to compel the production of, or access to, electronic communication from a service provider or access to electronic device information only pursuant to a warrant, wiretap order, order for electronic reader records, or subpoena.

This bill would additionally authorize a government entity to compel production of the above communications and information pursuant to an order for a pen register or trap and trace device.

(3) Existing law authorizes a government entity to access electronic device information by means of physical interaction or electronic communication with the device only in specified circumstances, including, among others, pursuant to a warrant or wiretap order, or with the specific consent of the authorized possessor of the device.

This bill would additionally authorize a government entity to access electronic device information by means of physical interaction or

electronic communication with the device pursuant to an order for a pen register or trap and trace device.

(4) The California Constitution provides for the Right to Truth in Evidence, which requires a $\frac{2}{3}$ vote of the Legislature to enact a statute that would exclude any relevant evidence from any criminal proceeding, as specified.

This bill would authorize any person in a trial, hearing, or proceeding to move to suppress wire or electronic information obtained or retained in violation of the 4th Amendment to the United States Constitution or of the pen register and trap and trace device provisions described above, as specified, and would authorize the Attorney General to commence a civil action to compel any government entity to comply with those provisions. The bill would also authorize an individual whose information is targeted by a warrant, order, or other legal process that is inconsistent with those provisions, the California Constitution, or the United States Constitution, or a service provider or any other recipient of the warrant, order, or other legal process to petition the issuing court to void or modify the warrant, order, or process, or to order the destruction of any information obtained in violation of those provisions, the California Constitution, or the United States Constitution. Because this bill would authorize the exclusion of relevant evidence obtained or retained in violation of those pen register and trap and trace device provisions in a criminal proceeding, it requires a $\frac{2}{3}$ vote of the Legislature.

(5) This bill would declare that it is to take effect immediately as an urgency statute.

Vote: $\frac{2}{3}$. Appropriation: no. Fiscal committee: yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 638.52 of the Penal Code is amended to
2 read:
3 638.52. (a) A peace officer may make an application to a
4 magistrate for an order or an extension of an order authorizing or
5 approving the installation and use of a pen register or a trap and
6 trace device. The application shall be in writing under oath or
7 equivalent affirmation, and shall include the identity of the peace
8 officer making the application and the identity of the law
9 enforcement agency conducting the investigation. The applicant

1 shall certify that the information likely to be obtained is relevant
2 to an ongoing criminal investigation and shall include a statement
3 of the offense to which the information likely to be obtained by
4 the pen register or trap and trace device relates.

5 (b) The magistrate shall enter an ex parte order authorizing the
6 installation and use of a pen register or a trap and trace device if
7 he or she finds that the information likely to be obtained by the
8 installation and use of a pen register or a trap and trace device is
9 relevant to an ongoing investigation and that there is probable
10 cause to believe that the pen register or trap and trace device will
11 lead to any of the following:

12 (1) Recovery of stolen or embezzled property.

13 (2) Property or things used as the means of committing a felony.

14 (3) Property or things in the possession of a person with the
15 intent to use them as a means of committing a public offense, or
16 in the possession of another to whom he or she may have delivered
17 them for the purpose of concealing them or preventing them from
18 being discovered.

19 (4) Evidence that tends to show a felony has been committed,
20 or tends to show that a particular person has committed or is
21 committing a felony.

22 (5) Evidence that tends to show that sexual exploitation of a
23 child, in violation of Section 311.3, or possession of matter
24 depicting sexual conduct of a person under 18 years of age, in
25 violation of Section 311.11, has occurred or is occurring.

26 (6) The location of a person who is unlawfully restrained or
27 reasonably believed to be a witness in a criminal investigation or
28 for whose arrest there is probable cause.

29 (7) Evidence that tends to show a violation of Section 3700.5
30 of the Labor Code, or tends to show that a particular person has
31 violated Section 3700.5 of the Labor Code.

32 (8) Evidence that does any of the following:

33 (A) Tends to show that a felony, a misdemeanor violation of
34 the Fish and Game Code, or a misdemeanor violation of the Public
35 Resources Code, has been committed or is being committed.

36 (B) Tends to show that a particular person has committed or is
37 committing a felony, a misdemeanor violation of the Fish and
38 Game Code, or a misdemeanor violation of the Public Resources
39 Code.

1 (C) Will assist in locating an individual who has committed or
2 is committing a felony, a misdemeanor violation of the Fish and
3 Game Code, or a misdemeanor violation of the Public Resources
4 Code.

5 (c) Information acquired solely pursuant to the authority for a
6 pen register or a trap and trace device shall not include any
7 information that may disclose the physical location of the
8 subscriber, except to the extent that the location may be determined
9 from the telephone number. Upon the request of the person seeking
10 the pen register or trap and trace device, the magistrate may seal
11 portions of the application pursuant to *People v. Hobbs* (1994) 7
12 Cal.4th 948, and Sections 1040, 1041, and 1042 of the Evidence
13 Code.

14 (d) An order issued pursuant to subdivision (b) shall specify all
15 of the following:

16 (1) The identity, if known, of the person to whom is leased or
17 in whose name is listed the telephone line to which the pen register
18 or trap and trace device is to be attached.

19 (2) The identity, if known, of the person who is the subject of
20 the criminal investigation.

21 (3) The number and, if known, physical location of the telephone
22 line to which the pen register or trap and trace device is to be
23 attached and, in the case of a trap and trace device, the geographic
24 limits of the trap and trace order.

25 (4) A statement of the offense to which the information likely
26 to be obtained by the pen register or trap and trace device relates.

27 (5) The order shall direct, if the applicant has requested, the
28 furnishing of information, facilities, and technical assistance
29 necessary to accomplish the installation of the pen register or trap
30 and trace device.

31 (e) An order issued under this section shall authorize the
32 installation and use of a pen register or a trap and trace device for
33 a period not to exceed 60 days.

34 (f) Extensions of the original order may be granted upon a new
35 application for an order under subdivisions (a) and (b) if the officer
36 shows that there is a continued probable cause that the information
37 or items sought under this subdivision are likely to be obtained
38 under the extension. The period of an extension shall not exceed
39 60 days.

(g) An order or extension order authorizing or approving the installation and use of a pen register or a trap and trace device shall direct that the order be sealed until the order, including any extensions, expires, and that the person owning or leasing the line to which the pen register or trap and trace device is attached not disclose the existence of the pen register or trap and trace device or the existence of the investigation to the listed subscriber or to any other person.

(h) Upon the presentation of an order, entered under subdivisions (b) or (f), by a peace officer authorized to install and use a pen register, a provider of wire or electronic communication service, landlord, custodian, or other person shall immediately provide the peace officer all information, facilities, and technical assistance necessary to accomplish the installation of the pen register unobtrusively and with a minimum of interference with the services provided to the party with respect to whom the installation and use is to take place, if the assistance is directed by the order.

(i) Upon the request of a peace officer authorized to receive the results of a trap and trace device, a provider of a wire or electronic communication service, landlord, custodian, or other person shall immediately install the device on the appropriate line and provide the peace officer all information, facilities, and technical assistance, including installation and operation of the device unobtrusively and with a minimum of interference with the services provided to the party with respect to whom the installation and use is to take place, if the installation and assistance is directed by the order.

(j) A provider of a wire or electronic communication service, landlord, custodian, or other person who provides facilities or technical assistance pursuant to this section shall be reasonably compensated by the requesting peace officer's law enforcement agency for the reasonable expenses incurred in providing the facilities and assistance.

(k) Unless otherwise ordered by the magistrate, the results of the pen register or trap and trace device shall be provided to the peace officer at reasonable intervals during regular business hours for the duration of the order.

(l) The magistrate, before issuing the order pursuant to subdivision (b), may examine on oath the person seeking the pen register or the trap and trace device, and any witnesses the person may produce, and shall take his or her affidavit or their affidavits

1 in writing, and cause the affidavit or affidavits to be subscribed
2 by the parties making them.

3 SEC. 2. Section 638.54 is added to the Penal Code, to read:

4 638.54. (a) Except as otherwise provided in this section, a
5 government entity that obtains information pursuant to Section
6 638.52, or obtains information pursuant to oral authorization
7 pursuant to Section 638.53, shall serve upon, or deliver to by
8 registered or first-class mail, electronic mail, or other means
9 reasonably calculated to be effective, the identified targets of the
10 order a notice that informs the recipient that information about the
11 recipient has been compelled or requested and states with
12 reasonable specificity the nature of the government investigation
13 under which the information is sought. The notice shall include a
14 copy of the order or a written statement setting forth facts giving
15 rise to the emergency. The notice shall be provided no later than
16 30 days after the termination of the period of the order, any
17 extensions, or *an* emergency request.

18 (b) (1) Prior to the expiration of the 30-day period specified in
19 subdivision (a), the government entity may submit a ~~request~~
20 ~~request~~, supported by a sworn ~~affidavit~~ *affidavit*, for an order
21 delaying unsealing of the order and notification and prohibiting
22 the person owning or leasing the line to which the pen register or
23 trap and trace device is attached from disclosing the existence of
24 the pen register or trap and trace device or the existence of the
25 investigation to the listed subscriber or any other person. The court
26 shall issue the order if the court determines that there is reason to
27 believe that notification may have an adverse result, but only for
28 the period of time that the court finds there is reason to believe
29 that the notification may have that adverse result, and not to exceed
30 90 days.

31 (2) The court may grant extensions of the delay of up to 90 days
32 each on the same grounds as provided in paragraph (1).

33 (3) Upon expiration of the period of delay of the notification,
34 the government entity shall serve upon, or deliver to by registered
35 or first-class mail, electronic mail, or other means reasonably
36 calculated to be effective as specified by the court issuing the order
37 authorizing delayed notification, the identified targets of the order
38 or emergency authorization a document that includes the
39 information described in subdivision (a) and a copy of all electronic
40 information obtained or a summary of that information, including,

1 at a minimum, the number and types of records disclosed, the date
2 and time when the earliest and latest records were created, and a
3 statement of the grounds for the court's determination to grant a
4 delay in notifying the individual. *The notice shall be provided no*
5 *later than three days after the expiration of the period of delay of*
6 *the notification.*

7 (c) If there is no identified target of an order or emergency
8 request at the time of its issuance, the government entity shall
9 submit to the Department of ~~Justice~~ *Justice*, ~~within three days of the~~
10 ~~execution of the warrant or issuance of the request~~ *no later*
11 *than three days after the termination of the period of the order;*
12 *any extensions, or an emergency request,* all of the information
13 required in subdivision (a). If an order delaying notice is obtained
14 pursuant to subdivision (b), the government entity shall submit to
15 ~~the department upon department,~~ *no later than three days after*
16 ~~the expiration of the period of delay of the notification~~ *notification,*
17 all of the information required in paragraph (3) of subdivision (b).
18 The department shall publish all those reports on its Internet Web
19 site within 90 days of receipt. The department may redact names
20 or other personal identifying information from the reports.

21 (d) For the purposes of this section, "adverse result" has the
22 meaning set forth in subdivision (a) of Section 1546.

23 SEC. 3. Section 638.55 is added to the Penal Code, immediately
24 following Section 638.54, to read:

25 638.55. (a) Any person in a trial, hearing, or proceeding may
26 move to suppress wire or electronic information obtained or
27 retained in violation of the Fourth Amendment to the United States
28 Constitution or of this chapter. The motion shall be made,
29 determined, and be subject to review in accordance with the
30 procedures set forth in subdivisions (b) to (q), inclusive, of Section
31 1538.5.

32 (b) The Attorney General may commence a civil action to
33 compel any government entity to comply with the provisions of
34 this chapter.

35 (c) An individual whose information is targeted by a warrant,
36 order, or other legal process that is not in compliance with this
37 chapter, the California Constitution, or the United States
38 Constitution, or a service provider or any other recipient of the
39 warrant, order, or other legal process may petition the issuing court
40 to void or modify the warrant, order, or process, or to order the

1 destruction of any information obtained in violation of this chapter,
2 the California Constitution, or the United States Constitution.

3 SEC. 4. Section 1546.1 of the Penal Code is amended to read:

4 1546.1. (a) Except as provided in this section, a government
5 entity shall not do any of the following:

6 (1) Compel the production of or access to electronic
7 communication information from a service provider.

8 (2) Compel the production of or access to electronic device
9 information from any person or entity other than the authorized
10 possessor of the device.

11 (3) Access electronic device information by means of physical
12 interaction or electronic communication with the electronic device.
13 This section does not prohibit the intended recipient of an electronic
14 communication from voluntarily disclosing electronic
15 communication information concerning that communication to a
16 government entity.

17 (b) A government entity may compel the production of or access
18 to electronic communication information from a service provider,
19 or compel the production of or access to electronic device
20 information from any person or entity other than the authorized
21 possessor of the device only under the following circumstances:

22 (1) Pursuant to a warrant issued pursuant to Chapter 3
23 (commencing with Section 1523) and subject to subdivision (d).

24 (2) Pursuant to a wiretap order issued pursuant to Chapter 1.4
25 (commencing with Section 629.50) of Title 15 of Part 1.

26 (3) Pursuant to an order for electronic reader records issued
27 pursuant to Section 1798.90 of the Civil Code.

28 (4) Pursuant to a subpoena issued pursuant to existing state law,
29 provided that the information is not sought for the purpose of
30 investigating or prosecuting a criminal offense, and compelling
31 the production of or access to the information via the subpoena is
32 not otherwise prohibited by state or federal law. Nothing in this
33 paragraph shall be construed to expand any authority under state
34 law to compel the production of or access to electronic information.

35 (5) Pursuant to an order for a pen register or trap and trace
36 device, or both, issued pursuant to Chapter 1.5 (commencing with
37 Section 630) of Title 15 of Part 1.

38 (c) A government entity may access electronic device
39 information by means of physical interaction or electronic
40 communication with the device only as follows:

1 (1) Pursuant to a warrant issued pursuant to Chapter 3
2 (commencing with Section 1523) and subject to subdivision (d).

3 (2) Pursuant to a wiretap order issued pursuant to Chapter 1.4
4 (commencing with Section 629.50) of Title 15 of Part 1.

5 (3) With the specific consent of the authorized possessor of the
6 device.

7 (4) With the specific consent of the owner of the device, only
8 when the device has been reported as lost or stolen.

9 (5) If the government entity, in good faith, believes that an
10 emergency involving danger of death or serious physical injury to
11 any person requires access to the electronic device information.

12 (6) If the government entity, in good faith, believes the device
13 to be lost, stolen, or abandoned, provided that the entity shall only
14 access electronic device information in order to attempt to identify,
15 verify, or contact the owner or authorized possessor of the device.

16 (7) Except where prohibited by state or federal law, if the device
17 is seized from an inmate's possession or found in an area of a
18 correctional facility under the jurisdiction of the Department of
19 Corrections and Rehabilitation where inmates have access and the
20 device is not in the possession of an individual and the device is
21 not known or believed to be the possession of an authorized visitor.
22 Nothing in this paragraph shall be construed to supersede or
23 override Section 4576.

24 (8) Pursuant to an order for a pen register or trap and trace
25 device, or both, issued pursuant to Chapter 1.5 (commencing with
26 Section 630) of Title 15 of Part 1.

27 (d) Any warrant for electronic information shall comply with
28 the following:

29 (1) The warrant shall describe with particularity the information
30 to be seized by specifying the time periods covered and, as
31 appropriate and reasonable, the target individuals or accounts, the
32 applications or services covered, and the types of information
33 sought.

34 (2) The warrant shall require that any information obtained
35 through the execution of the warrant that is unrelated to the
36 objective of the warrant shall be sealed and not subject to further
37 review, use, or disclosure without a court order. A court shall issue
38 such an order upon a finding that there is probable cause to believe
39 that the information is relevant to an active investigation, or review,
40 use, or disclosure is required by state or federal law.

1 (3) The warrant shall comply with all other provisions of
2 California and federal law, including any provisions prohibiting,
3 limiting, or imposing additional requirements on the use of search
4 warrants. If directed to a service provider, the warrant shall be
5 accompanied by an order requiring the service provider to verify
6 the authenticity of electronic information that it produces by
7 providing an affidavit that complies with the requirements set forth
8 in Section 1561 of the Evidence Code. Admission of that
9 information into evidence shall be subject to Section 1562 of the
10 Evidence Code.

11 (e) When issuing any warrant or order for electronic information,
12 or upon the petition from the target or recipient of the warrant or
13 order, a court may, at its discretion, do any or all of the following:

14 (1) Appoint a special master, as described in subdivision (d) of
15 Section 1524, charged with ensuring that only information
16 necessary to achieve the objective of the warrant or order is
17 produced or accessed.

18 (2) Require that any information obtained through the execution
19 of the warrant or order that is unrelated to the objective of the
20 warrant be destroyed as soon as feasible after the termination of
21 the current investigation and any related investigations or
22 proceedings.

23 (f) A service provider may voluntarily disclose electronic
24 communication information or subscriber information when that
25 disclosure is not otherwise prohibited by state or federal law.

26 (g) If a government entity receives electronic communication
27 information voluntarily provided pursuant to subdivision (f), it
28 shall destroy that information within 90 days unless one or more
29 of the following circumstances apply:

30 (1) The entity has or obtains the specific consent of the sender
31 or recipient of the electronic communications about which
32 information was disclosed.

33 (2) The entity obtains a court order authorizing the retention of
34 the information. A court shall issue a retention order upon a finding
35 that the conditions justifying the initial voluntary disclosure persist,
36 in which case the court shall authorize the retention of the
37 information only for so long as those conditions persist, or there
38 is probable cause to believe that the information constitutes
39 evidence that a crime has been committed.

1 (3) The entity reasonably believes that the information relates
2 to child pornography and the information is retained as part of a
3 multiagency database used in the investigation of child
4 pornography and related crimes.

5 (h) If a government entity obtains electronic information
6 pursuant to an emergency involving danger of death or serious
7 physical injury to a person, that requires access to the electronic
8 information without delay, the entity shall, within three days after
9 obtaining the electronic information, file with the appropriate court
10 an application for a warrant or order authorizing obtaining the
11 electronic information or a motion seeking approval of the
12 emergency disclosures that shall set forth the facts giving rise to
13 the emergency, and if applicable, a request supported by a sworn
14 affidavit for an order delaying notification under paragraph (1) of
15 subdivision (b) of Section 1546.2. The court shall promptly rule
16 on the application or motion and shall order the immediate
17 destruction of all information obtained, and immediate notification
18 pursuant to subdivision (a) of Section 1546.2 if such notice has
19 not already been given, upon a finding that the facts did not give
20 rise to an emergency or upon rejecting the warrant or order
21 application on any other ground.

22 (i) This section does not limit the authority of a government
23 entity to use an administrative, grand jury, trial, or civil discovery
24 subpoena to do any of the following:

25 (1) Require an originator, addressee, or intended recipient of
26 an electronic communication to disclose any electronic
27 communication information associated with that communication.

28 (2) Require an entity that provides electronic communications
29 services to its officers, directors, employees, or agents for the
30 purpose of carrying out their duties, to disclose electronic
31 communication information associated with an electronic
32 communication to or from an officer, director, employee, or agent
33 of the entity.

34 (3) Require a service provider to provide subscriber information.

35 SEC. 5. This act is an urgency statute necessary for the
36 immediate preservation of the public peace, health, or safety within
37 the meaning of Article IV of the Constitution and shall go into
38 immediate effect. The facts constituting the necessity are:

39 In order for government entities to more effectively utilize pen
40 registers and trap and trace devices when engaging in vital law

1 enforcement activities, it is necessary for this bill to take immediate
2 effect.

O